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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISON

IMMIGRANT DEFENDERS LAW CENTER, *et al.*,

Plaintiffs,

vs.

CHAD WOLF, *et al.*,

Defendants.

Case No.: 2:20-CV-09893-JGB-SHK

UNOPPOSED MOTION BY IMMIGRATION LAW PROFESSORS FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Judge: Honorable Jesus G. Bernal
Date: December 14, 2020
Time: 9:00 a.m.
Crtrm:1

Proposed *amici* are professors with expertise in immigration law. They hereby move for leave to file a brief as *amici curiae* in support of Plaintiffs' Emergency Motion for a Preliminary Injunction. Plaintiffs and Defendants have consented to this motion (Defendants have provided blanket consent to *amici* briefs). A copy of the proposed order granting this motion, along with a copy of the proposed brief, are submitted herewith.

Proposed *amici* teach both doctrinal and experiential courses in immigration law, have written numerous scholarly articles on immigration law, and understand the practical aspects of immigration law through client representation, particularly asylum law and asylum processing at the border. They have expertise in the Immigration and Nationality Act ("INA") and the detention scheme it sets forth. They submit this brief to demonstrate that noncitizens placed in the Migrant Protection Protocols ("MPP") are considered detained under the INA, regulations, and Department of Homeland Security ("DHS") guidance on MPP, as well as by the Executive Office for Immigration Review ("EOIR); at a minimum, they should be considered in constructive custody under relevant caselaw.

Showing that noncitizens in MPP are detained both while in Mexico and while in the United States is relevant to this case because DHS has special obligations to protect access to counsel for detained noncitizens. *See Orantes-*

Hernandez v. Thornburgh, 919 F.2d 549, 566 (9th Cir. 1990); *Torres v. United States Dep't of Homeland Security*, 411 F.Supp.3d 1036, 1061 (C.D. Cal. 2019); ICE, Performance Based National Detention Standards (2011) at 385 (Standard 5.6 on Telephone Access), 398 (Standard 5.7 on Visitation), 421-428 (Standard 6.3 on Law Libraries and Legal Materials), 435-440 (Standard 6.4 on Legal Rights Group Presentations).

For the foregoing reasons, proposed *amici* immigration law professors respectfully request that the court grant leave to file an *amici curiae* brief in support of Plaintiffs' Emergency Motion for a Preliminary Injunction.

DATED: November 20, 2020

Respectfully submitted,

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[PROPOSED] ORDER GRANTING IMMIGRATION LAW PROFESSORS' UNOPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Judge: Honorable Jesus G. Bernal
Date: December 14, 2020
Time: 9:00 a.m.
Crtrm:1

Immigration Law Professors' Unopposed Motion for Leave to File *Amici Curiae* Brief in support of Plaintiffs' Motion for Preliminary Injunction is hereby GRANTED.

IT IS SO ORDERED.

Dated: _____ 2020

_____
The Honorable Jesus G. Bernal
United States District Judge

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BRIEF OF *AMICI CURIAE* IMMIGRATION LAW PROFESSORS IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF AMICI CURIAE

Amici are professors with expertise in immigration law. They teach both doctrinal and experiential courses in immigration law, have written numerous scholarly articles on immigration law, and understand the practical aspects of immigration law through client representation, particularly asylum law and asylum processing at the border. They have expertise in the Immigration and Nationality Act ("INA") and the detention scheme it sets forth. They submit this brief to demonstrate that noncitizens placed in the Migrant Protection Protocols ("MPP") are considered detained under the INA, regulations, and Department of Homeland Security ("DHS") guidance on MPP; at a minimum, they should be considered in constructive custody under relevant caselaw.

ARGUMENT

I. INDIVIDUALS SUBJECTED TO MPP ARE DETAINED UNDER THE INA AND ITS REGULATIONS.

A. The Structure of the INA Creates a Comprehensive Detention Scheme that Classifies Noncitizens in MPP as Detained During Their Entire Removal Proceedings, Without Any Exception Based on Location in Mexico.

The INA authorizes detention of noncitizens seeking admission to the United States under 8 U.S.C. § 1225(b)(1) and 8 U.S.C. § 1225(b)(2). DHS invokes 8 U.S.C. § 1225(b)(2) as the basis for returning noncitizens to Mexico during their removal proceedings under MPP. This portion of the statute foresees

detention throughout removal proceedings, whether or not the noncitizen is returned to Mexico during those proceedings. *See* 8 U.S.C. § 1225(b)(2).

Specifically, DHS relies on § 1225(b)(2)(C) as providing legal authority for MPP, which cross-references and expands on the general provision in § 1225(b)(2)(A) by allowing for the return of certain noncitizens arriving by land to a contiguous territory for the pendency of the removal proceedings in immigration court. Under 8 U.S.C. § 1225(b)(2)(A), requires detention "*for a [removal] proceeding*" regardless of whether the noncitizen is returned to a contiguous territory. 8 U.S.C. § 1225(b)(2)(A) (emphasis added). Nothing about the contiguous territory provision at 8 U.S.C. § 1225(b)(2)(C) vitiates that detention lasts throughout the removal proceeding, even if the noncitizen is located in Mexico while the removal proceeding is ongoing.

No other part of the INA's detention scheme alters this classification of noncitizens in MPP as detained throughout their removal proceedings. The other provision covering arriving noncitizens, at 8 U.S.C. § 1225(b)(1), is not applicable or applied to those in MPP. It pertains to those subjected to expedited removal and provides that individuals who pass a credible fear interview "shall be detained for further consideration of the application for asylum." 8 U.S.C. § 1225(b)(1)(B)(ii). As the Supreme Court has explained, "[noncitizens] who are

covered by § 1225(b)(2) are detained pursuant to a different process" than those detained under § 1225(b)(1). *Jennings v. Rodriguez,* 138 S.Ct. 830, 837 (2018).

For noncitizens who have already entered the United States, as opposed to those seeking admission, detention authority during removal proceedings comes from 8 U.S.C. § 1226, rather than 8 U.S.C. § 1225. *Jennings*, 138 S. Ct. at 837. With certain exceptions, the Attorney General "may release" a noncitizen detained under § 1226(a) "on bond . . . or conditional parole." 8 U.S.C. § 1226(a); *see also* 8 U.S.C. § 1226(c) (setting forth exceptions based on criminal offenses. Once a noncitizen is subject to a final order of removal, detention authority shifts to § 1231(a)(6). *See Diouf v. Napolitano*, 634 F.3d 1081, 1085 (9th Cir. 2011). This statutory detention classification scheme is complex, as it "is not static; rather, the Attorney General's authority over an alien's detention shifts as the alien moves through different phases of administrative and judicial review." *Casas-Castrillon v. Department of Homeland Sec.*, 535 F.3d 942, 945 (9th Cir. 2008) (finding that detention authority had shifted from § 1226(c) to § 1226(a) during judicial review after the BIA affirmed the order of removal).

When a statute provides such a comprehensive and detailed detention scheme, and noncitizens in MPP clearly fit within the category described in § 1225(b)(2)(C), a court should not second-guess Congress's unambiguous language that noncitizens in that category are detained throughout their removal

proceedings. There is no exception to detention based on being located in Mexico, and inventing exceptions not set forth by Congress would undermine the statutory scheme. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (citations omitted). If Congress had wanted to create an exception to detention for individuals returned to contiguous territories under § 1225(b)(2)(C), it could have done so, but it did not.

B. 8 C.F.R. § 253.3(d) Plainly States that Noncitizens in MPP Are "Considered Detained."

The regulation implementing the relevant statutory provisions, 8 C.F.R. § 235.3(d), makes even more explicit that individuals in MPP are detained throughout their removal proceedings, even while they are in Mexico. This regulation provides that DHS "will assume custody of any alien subject to detention under paragraph (b) or (c) of this section." 8 C.F.R. § 235.3(d). Paragraph (c), referenced in § 235.3(d), pertains to "arriving aliens placed in proceedings under section 240 of the Act," which includes those placed in MPP pursuant to 8 U.S.C. § 1225(b)(2)(A), (C). 8 C.F.R. § 235.3(c). The regulation further states that "[i]n its discretion, [DHS] may require any alien who appears inadmissible and who arrives at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing." 8 C.F.R.

§ 235.3(d). Critically, the regulation continues, "such alien shall be *considered detained for a proceeding within the meaning of section 235(b) of the Act*." 8 C.F.R. § 235.3(d) (emphasis added). The plain text of this regulation states "*considered* detained," instead of simply "detained," which indicates that the noncitizen does not need to be in an ICE detention center to be classified as detained under the statute. The ordinary meaning of "considered" in this context would be to *regard* or *deem* those in MPP as detained, even while they are in Mexico. *See* Oxford English Dictionary Online (2020) (defining consider as "to regard in a certain light or aspect; to look upon (as), think (to be), take for").

The Supreme Court has stressed the importance of "giv[ing] effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation omitted) (rejecting an interpretation of a statute "that would render the word 'State' insignificant, if not wholly superfluous"); *see also Williams v. Taylor,* 529 U.S. 362, 404 (2000) (describing this rule against surplusage as a "cardinal principle of statutory construction"). The same interpretive rule should be applied to a regulation. Here, requiring detention in an ICE detention center to establish that detention is taking place would render the word "considered" wholly superfluous.

Similarly, several other parts of 8 C.F.R. § 235.3 use the word "detained" to reference detention specifically in a facility or vessel, but that language is not

used at 8 C.F.R. § 235.3(d), making clear that individuals in MPP are considered detained under 8 C.F.R. § 235.3(d) even where they are not in a detention center. *See*, *e.g.*, 8 C.F.R. § 235.3(a) ("shall be detained aboard the vessel"); 8 C.F.R. § 235.3(e) ("detained at a facility"). Under the interpretive rule of meaningful variation, "considered detained" should be interpreted differently than "detained at a facility" or "detained aboard the vessel." *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n. 9 (2004) (applying "the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended'") (citing 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th rev.ed.2000)). Accordingly, under the government's scheme, a noncitizen placed in MPP is initially detained under § 1225(b)(2) and should still be "considered detained" pursuant to that provision when returned to Mexico even though the noncitizen is not incarcerated in a traditional immigration detention center.

C. DHS Guidance Confirms that Noncitizens in MPP are Considered Detained Throughout Their Proceedings.

DHS's guidance confirms that noncitizens in MPP are considered detained throughout their removal proceedings, including when they are in Mexico, as well as when they present themselves at the port of entry for a hearing. *See* Memorandum from Nathalie R. Asher to [ICE] Field Office Directors, "Migrant

Protection Protocols Guidance," Feb. 12, 2019, at 2, *available at* https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf ("Asher Memorandum"). The memo provides that noncitizens in MPP appearing for their hearings are "paroled into the United States by CBP" and then "detained in ICE custody." *Id.* at 2. This parole is pursuant to 8 C.F.R. § 212(d)(5) and enables the noncitizen to physically enter the United States while, as a practical matter, remaining in detention throughout. The detention authority, under 8 U.S.C. § 1225(b)(2)(A), simply transfers from one entity to another. CBP controls detention in Mexico and upon arrival at a port of entry, while ICE controls detention during the time that an asylum seeker in MPP is in the United States for a hearing. *Id.* CBP's "MPP Guiding Principles" confirm that "[Ports of Entry] will coordinate with ICE ERO to establish transfer of custody and expeditious transportation from the POE and court location, as well as the handling of the alien during all court proceedings." *See* CBP, MPP Guiding Principles (January 28, 2019), *available at* https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf.

Once the noncitizen has been paroled into the United States, ICE is "responsible for maintaining custody of the alien" during transportation to and from the hearing, as well as during the hearing itself. Asher Memorandum at 3

After the hearing, if the proceedings are not concluded, CBP officers again "take custody of the alien to return the alien to Mexico to await further proceedings." *Id.* at 2. This means that the noncitizen is once again "considered detained" by CBP in Mexico under § 1225(b)(2)(A) and the regulations. If someone in MPP is granted relief by the immigration court, the memo instructs ICE's record to state "'MPP, Granted Relief, *Released from Custody*.'" *Id.* at 4 (emphasis added).

D. The Immigration Courts and Board of Immigration Appeals Treat Noncitizens in MPP as Detained.

The Executive Office for Immigration Review ("EOIR") also treats individuals in MPP as detained. Until they were suspended altogether, hearings in immigration courts in MPP cases were expedited as detained cases. The Transactional Records Access Clearinghouse ("TRAC"), an organization based at Syracuse University that obtains immigration data from EOIR through FOIA requests, confirms that the custody status for MPP cases is "detained." *See* TRAC, *Details on MPP (Remain in Mexico) Deportation Proceedings* (Sept. 2020), *available at* https://trac.syr.edu/phptools/immigration/mpp/ (sorting by "custody" shows 60,842 MPP cases in immigration courts listed as "detained"). The BIA likewise recognizes individuals in MPP as detained, even when they are in Mexico, by placing their appeals on the detained docket and requiring simultaneous briefing.

II. CUSTODY DOES NOT REQUIRE PHYSICAL DETENTION.

Because the plain language of 8 C.F.R. § 235.3(d) states that individuals subjected to MPP "shall be considered detained," the Court need look no further to decide that they are in custody. However, an examination of the concept of constructive custody further supports this conclusion. "Constructive custody" is defined as "'custody of a person . . . whose freedom is controlled by a legal authority but who is not under direct physical control.'" *Johnson v. Gill*, 883 F.3d 756, 761 (9th Cir. 2018) (quoting *Black's Law Dictionary*'s definition of "constructive custody"). For purposes of habeas jurisdiction, an individual is "in custody" if there are significant restraints on his or her personal liberty that are "not shared by the public generally." *Jones v. Cunningham*, 371 U.S. 236, 237-239 (1963) (holding that a parolee was in custody). Although the present case is not a petition for writ of habeas corpus, the jurisprudence in this area is informative for the Court's analysis of constructive custody, as it makes clear that a person can be considered to be in custody even if they are not in conventional incarceration (in a detention facility).

Just as the parolee in *Jones* was found to be in custody because of his reporting requirements, individuals in MPP must comply with what Plaintiffs call DHS's "Presentation Requirement" by appearing repeatedly at a specified port of entry at a specified time for hearings and other proceedings. This "Presentation

Requirement" effectively restrains their mobility in Mexico and creates the constructive custody that is considered detention under 8 U.S.C. § 1225(b)(2)(A) and 8 C.F.R. § 253.3(d). The limited amount of freedom of movement in Mexico does not undercut the constructive custody created by the Presentation Requirement. *Cf. Contreras v. Schiltgen*, 122 F.3d 30 (9th Cir. 1997) (noncitizen released on bond was still in "constructive custody"); *Justices of Boston Municipal Ct. v. Lydon*, 466 U.S. 294, 300-01 (1984) (petitioner in custody where he was required to appear for trial and "at any subsequent time to which the case may be continued"); *United States v. Dist. Director of Immigration*, 634 F.2d 964, 971 (5th Cir. 1981) (noncitizen on supervised parole who had to report periodically to immigration authorities was in custody); *Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cty., Cal.,* 411 U.S. 345, 348 (1973) (petitioner released on his own recognizance was in custody where he was required to appear "at all times and places as ordered").

Even if one were to consider only the time periods where the noncitizen is at the port of entry waiting to be paroled in, and then physically under ICE's control for transportation to and from each hearing and during the hearing, that would be sufficient to establish custody throughout the entire removal proceeding. The Ninth Circuit has held that a sentence requiring a habeas petitioner to attend just *fourteen hours of alcohol rehabilitation classes* over a

period of several days amounted to custody because it required his "physical presence at a particular place" and "significantly restrain[ed] [his] liberty." *Dow v. Circuit Court of the First Circuit Through Huddy*, 995 F.3d 922, 923 (9th Cir. 1993) (per curiam); *see also Barry v. Bergen County Probation Department*, 128 F.3d 152, 161 (3d Cir. 1997) (finding that a sentence of community service that required being "in a certain place—or in one of several places—to attend meetings or to perform services" amounted to custody). MPP imposes at least as much restraint on liberty as fourteen hours of classes or community service.

Being located outside the geographical United States does not undercut this custody analysis. Courts have refused to "carve out an exception" to custody "where the physical custodian is a foreign body," or where "the executive is allegedly working through the intermediary of a foreign ally." *Abu Ali v. Ashcroft*, 350 F.Supp.2d 28, 49 (D.D.C. 2004) (holding that an individual was in the constructive custody of the United States where he was detained in a prison in Saudi Arabia "at the behest and ongoing supervision of the United States").

In *K.M.H.C. v. Barr*, the Southern District of California erred in finding that a petitioner subjected to MPP awaiting an immigration court hearing was not in custody. 437 F.Supp.3d 786, 791-92 (S.D. Cal. 2020). There, the court reasoned that the petitioner was "at liberty to determine where to reside outside of the U.S., where to travel outside of the U.S., and whether to appear at the

designated port of entry for her immigration court hearing." *K.M.H.C.*, 437 F.Supp.3d at 791. The court erred by failing to consider the individual's detention classification under the INA, as discussed in Part I above. The court erroneously relied on Ninth Circuit precedent holding that individuals who have *already been removed* to their home countries are no longer subject to any control by U.S. authorities for purposes of a habeas petition. *Miranda v. Reno*, 238 F.3d 1156, 1159 (9th Cir. 2001). The INA's detention classification scheme clearly differentiates between someone who is already removed (and therefore is excluded from the detention scheme) and someone who is being detained during removal proceedings pursuant to 1225(b)(2)(A), which is the case for people in MPP. Additionally, asylum seekers subject to MPP are far from living freely in their home countries or any other country. They are trapped in Mexico near the U.S. border awaiting further proceedings in their removal cases and must comply with numerous restrictions on their liberty, as described above.

CONCLUSION

Based on the foregoing, *amici* urge the Court to consider individuals in MPP in custody throughout their removal proceedings, both in Mexico and in the United States. One critical implication of being in custody is that DHS has special obligations to protect access to counsel for noncitizens in MPP regardless of location. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 566 (9th Cir.

1990) (affirming the district court's finding that immigration authorities have an obligation to provide detained noncitizens with legal assistance, including access to counsel); *Torres v. United States Dep't of Homeland Security*, 411 F.Supp.3d 1036, 1061 (C.D. Cal. 2019) (recognizing that if access to counsel for detained noncitizens is not protected, other "statutory rights would never be realized").[1]

DATED: November 20, 2020

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[1] *See also* ICE, Performance Based National Detention Standards (2011) at 385 (Standard 5.6 on Telephone Access), 398 (Standard 5.7 on Visitation), 421-428 (Standard 6.3 on Law Libraries and Legal Materials), 435-440 (Standard 6.4 on Legal Rights Group Presentations).

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